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6 MYSFYT, INC., a California corporation
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 MYSFYT, INC., a California corporation,

Case No.

13 Plaintiff,

**COMPLAINT FOR TRADE DRESS
INFRINGEMENT, FALSE DESIGNATION
OF ORIGIN AND UNFAIR
COMPETITION**

14 v.

DEMAND FOR JURY TRIAL

15 SECRET BY NATURE, LLC an Ohio
16 limited liability company; AUSTIN
SONG; and DOES 1-20, inclusive,

17 Defendant.

18
19 COMES NOW Plaintiff MYSFYT, INC., a California Corporation ("Plaintiff") and
20 alleges against Defendants SECRET BY NATURE, LLC; AUSTIN SONG; and DOES 1-20,
21 inclusive (collectively, "Defendants"), as follows:

22 **JURISDICTION**

23 1. This Court has original subject matter jurisdiction over the claims in this action
24 that relate to trade dress infringement, false designation of origin and federal unfair competition
25 pursuant to 28 U.S.C. §§ 1331 and 1332(a), and 15 U.S.C. §§ 1116(a) and 1125(a), as these
26 claims arise under the laws of the United States, are between citizens of different states and the
27 matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs.
28 The Court has supplemental jurisdiction over the claims in this Complaint which arise under state

1 law pursuant to 28 U.S.C. § 1337(a) because the state law claims are so related to the federal
2 claims that they form part of the same case or controversy and derive from a common nucleus of
3 operative facts.

4 2. This Court has personal jurisdiction over Defendants because Defendants have a
5 continuous, systematic, and substantial presence within this judicial district, including by selling
6 and offering for sale infringing products in this judicial district, and by committing acts of trade
7 dress infringement in this judicial district, including but not limited to selling infringing cosmetics
8 and skin care products directly to consumers and/or retailers in this district and selling into the
9 stream of commerce knowing such products would be sold in California and this district, which
10 acts form a substantial part of the events or omissions giving rise to Plaintiff's claims.

VENUE

12 3. A substantial part of the events or omissions giving rise to the claims asserted in
13 this Complaint occurred in this judicial district. (28 U.S.C. § 1391(b)(2).)

PARTIES

15 4. Plaintiff MYSFYT, INC. is a California corporation, was duly organized and
16 exists under the laws of the State of California, and is not subject to The Banking Law or The
17 Public Utilities Act. Plaintiff is a California citizen, and has its principal office in San Francisco,
18 California.

19 5. Plaintiff is informed and believes, and based thereon alleges, that Defendant
20 SECRET BY NATURE, LLC is an Ohio limited liability company, was duly organized and exists
21 under the laws of the State of Ohio. Plaintiff is informed and believes, and based thereon alleges,
22 that Defendant is an Ohio citizen, and that its principal office is located in Twinsburg, Ohio.
23 Plaintiff is further informed and believes, and based thereon alleges, that Defendant Secret by
24 Nature, LLC is the alter ego of Defendant Austin Song.

25 6. Plaintiff is informed and believes, and based thereon alleges, that Defendant
26 AUSTIN SONG is an individual residing in Hudson, Ohio, and a citizen of Ohio.

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1 7. Plaintiff is ignorant of the true names and capacities of Defendants sued as DOES
2 1-20, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will
3 amend this Complaint to allege their true names and capacities when ascertained.

GENERAL ALLEGATIONS

5 8. Plaintiff is the owner of the website Acne.org. Since 1996, Acne.org has been a
6 premier online resource for skin care and acne treatment, and a community for those afflicted by
7 acne. Acne.org is a community of over half a million members, has over 2.5 million monthly
8 visitors and is recognized as a leader in the skin care industry. Among other things, Acne.org
9 offers a resource to members and non-members alike to discuss skin care problems and solutions,
10 offer support and advice and serve as a community forum for discussing the latest acne research
11 and treatments.

12 9. To further its goal of providing resources and research to individuals affected by
13 acne, Acne.org developed the proprietary “Acne.org Regimen,” a detailed step-by-step guide
14 intended to address, treat and eliminate all forms of acne. The “Acne.org Regimen” is a detailed
15 three-step process which involves the use of various proprietary skin care treatments, including a
16 facial cleanser, a Benzoyl Peroxide 2.5% treatment and a moisturizer with Licochalcone. The
17 “Acne.org Regiment” is administered in specified amounts, pursuant to a detailed schedule. The
18 “Acne.org Regimen” was developed by Plaintiff in 1996, after 20 years of research and
19 development, and has been promoted on its website and through various media since 1996.

20 10. Acne.org was initially formed to provide a community resource for people
21 suffering from acne. Soon after its formation, Plaintiff realized that to best serve its members and
22 further its goal of promoting the “Acne.org Regimen,” it was best to operate as a for-profit entity,
23 something which would enable Plaintiff to produce affordable and top quality skin care products.
24 Acne.org began to source, manufacture and sell the proprietary blend of skin care products which
25 made up the “Acne.org Regimen,” including facial cleanser, a Benzoyl Peroxide 2.5% treatment
26 and a Licochalcone moisturizer. The 2.5% Benzoyl Peroxide treatment is a particularly important
27 part of the “Acne.org Regimen,” as it is only a quarter as potent as the standard 10% Benzoyl
28 Peroxide acne treatment sold by other skin care companies, an innovation which significantly

1 reduces the likelihood of excessive dryness and irritation common from a 10% Benzoyl Peroxide
2 product. In addition, the 2.5% Benzoyl Peroxide treatment uses an unique and proprietary gel
3 formulation, as opposed to a liquid or cream formula, which prevents clumping and allows the
4 solution to absorb better into skin.

5 11. Acne.org began marketing and selling its 2.5% Benzoyl Peroxide product (the
6 “2.5% BP Product”) in 2003 as a part of The Acne.org Regimen. The 2.5% BP Product has
7 continuously been marketed and sold in distinctive white “Boston Rounds” pump bottles. On the
8 basis of its strong reputation and distinctive trademarks, Acne.org has become a leader in the
9 cosmetic and skin care industry. Its distinctive packaging has also developed a secondary
10 meaning within the cosmetic skin care industry, based not only on the number of products sold
11 but on Acne.org’s 500,000 strong member community. The 2.5% BP Product is marketed and
12 sold primarily through the Acne.org website and on Amazon.com.

13 12. Plaintiff is informed and believes, and based thereon alleges, that Defendant, doing
14 business as “Dr. Song Medical,” began marketing and selling a “2.5% Benzoyl Peroxide Dr. Song
15 Acne Gel” (the “Infringing Product”) in 2013, primarily through Amazon.com. Plaintiff is
16 further informed and believes, and based thereon alleges, that the Infringing Product is designed
17 and intended to replicate the packaging of the 2.5% BP Product, which has, and will continue to,
18 cause confusion among Acne.org’s customers and the public at large.

19 13. The Infringing Product has adopted a number of the distinctive features of the
20 2.5% BP Product, along with its general “look and feel,” in violation of section 43(a) of the
21 Lanham Act (15 U.S.C. § 1125(a)). Specifically, the Infringing Product uses the same white
22 “Boston Round” pump bottle which is associated with the 2.5% BP Product. The Infringing
23 Product also employs an identical white opaque appearance which appears reflective in
24 advertisements. The Infringing Product uses the same font as the 2.5% BP Product. This is not to
25 mention the fact that the Infringing Product has copied Acne.org’s unique gel formula and
26 Benzoyl Peroxide concentration, and is offered in 2oz, 8oz and 16oz bottles, identical sizes to
27 those offered by Acne.org until approximately one year ago. To further its goal of misleading
28 and confusing customers by misappropriating the trade dress of the 2.5% BP Product, Defendant

1 has paid for advertising for the Infringing Product around Acne.org's various products on
2 Amazon.

3 14. In addition to copying the trade dress and Benzoyl Peroxide concentration of the
4 2.5% BP Product, Defendant has advertised and marketed the Infringing Product using nearly
5 identical language to that used by Plaintiff to describe Step 2 of the "Acne.org Regimen,"
6 including, but not limited to, the strategy developed by Plaintiff to apply "one finger's length of
7 product" to the user's face.

8 15. Taken together, Defendant has, without permission, consent and/or authorization
9 from Plaintiff, made an unauthorized use of the trade dress for the 2.5% BP Product and marketed
10 and advertised the Infringing Product with the goal of misleading consumers to believe that the
11 Infringing Product is somehow associated with the proprietary "Acne.org Regimen." Plaintiff is
12 informed and believes, and based thereon alleges, that the Infringing Product is intended to trade
13 upon the goodwill and substantial recognition associated with the 2.5% BP Product and the
14 "Acne.org Regimen," and to cause confusion, mistake and deception amongst Plaintiff's
15 customers.

16 16. Plaintiff is informed and believes, and based thereon alleges, that as a result of the
17 acts complained of herein, Defendant has created a substantial likelihood of injury to Plaintiff's
18 business reputation, and a significant likelihood of consumer confusion, mistake and deception as
19 to the relationship between the Infringing Product and the 2.5% BP Product and the "Acne.org
20 Regimen," and that Defendant has caused actual confusion by unfairly competing with Plaintiff
21 by unlawfully trading on and using the trade dress of the 2.5% BP Product without permission
22 and/or consent.

23 17. Plaintiff is informed and believes, and based thereon alleges, that the acts by
24 Defendant complained of herein were willful and deliberate, and that they have caused Plaintiff to
25 suffer irreparable injury to its business. Plaintiff will continue to suffer irreparable injury to its
26 business, along with a loss of goodwill and reputation, unless and until Defendant is preliminarily
27 and permanently enjoined from its wrongful conduct.

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ALTER EGO ALLEGATIONS

18. Plaintiff is informed and believes, and based thereon alleges, that there exists, and at all times mentioned herein there existed, Defendant Secret by Nature, LLC was the alter ego of Defendant Austin Song, by reason of the following. Plaintiff is informed and believes, and based thereon alleges, that Defendant Austin Song is the sole member and manager of Secret by Nature, LLC, and that there existed, and continues to exist, a unity of interest and ownership between Defendants Austin Song and Secret by Nature, LLC, such that any individuality and separateness between these defendants has ceased.

19. Plaintiff is informed and believes, and based thereon alleges, that Defendants Austin Song and Secret by Nature, LLC, have commingled their respective funds and other assets, and failed to segregate the funds of the LLC and Mr. Song, such that corporate assets have been diverted for the personal use of Mr. Song and *vice versa*. Plaintiff is further informed and believes, and based thereon alleges, that in furtherance of the failure to segregate corporate funds and assets, Mr. Song has treated the assets of the LLC as his personal assets.

20. Plaintiff is informed and believes, and based thereon alleges, that Defendant Austin Song has failed to adequately capitalize Defendant Secret by Nature, LLC

21. Plaintiff is informed and believes, and based thereon alleges, that Defendant Austin Song has recklessly, intentionally and fraudulently advertised himself and Secret by Nature, LLC through the d/b/a "Dr. Song Medicals," and through this d/b/a, has engaged in the tortious conduct alleged herein.

22. For the foregoing reasons, Plaintiff is informed and believes, and based thereon alleges, that adherence to the fiction of the separate existence of Defendants Secret by Nature, LLC and Austin Song would be unfair and unjust, and would result in an abuse of the corporate privilege and would additionally sanction fraud and promote injustice.

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FIRST CAUSE OF ACTION

Federal Trade Dress Infringement

(15 U.S.C. § 1125(a))

(Against Defendants)

23. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1-22, inclusive, of this Complaint, as though set forth in full herein.

24. This is a claim for trade dress infringement pursuant to 15 U.S.C. § 1125(a).

25. Plaintiff is informed and believes, and based thereon alleges, that the trade dress on Plaintiff's 2.5% BP Product has acquired a secondary meaning within the cosmetic skin care industry to actual and potential customers, based on the longstanding use of the trade dress, the number of products sold and the 500,000 member strong community on Acne.org.

26. Plaintiff is informed and believes, and based thereon alleges, that since 2013, Defendants have developed, marketed, advertised and sold the Infringing Product, via both its website, dr.song.myshopify.com and Amazon.com, which uses trade dress confusingly similar to the 2.5% BP Product trade dress.

27. Plaintiff is informed and believes, and based thereon alleges, that Defendants' acts of trade dress infringement were undertaken willfully and with the full knowledge and intent of causing confusion, and to mislead and deceive the purchasing public.

28. Plaintiff is informed and believes, and based thereon alleges, that Defendants have actually derived and received, and will continue to derive and receive, significant and substantial gains, profits and advantages from its trade dress infringement on the Infringing Product in an amount not presently known to Plaintiff, but in excess of \$75,000, and which will be proven at trial. As a direct and proximate result of Defendants' actions and continuing trade dress infringement, Plaintiff has been damaged and is entitled to injunctive, equitable and/or monetary relief in an amount to be proven at trial.

29. Plaintiff is informed and believes, and based thereon alleges, that as a direct and proximate result of Defendants' continuing trade dress infringement, Plaintiff has suffered, and

1 will continue to suffer, great and irreparable injury for which Plaintiff has no adequate remedy at
2 law.

3 WHEREFORE, Plaintiff prays for damages as set forth below.

4 **SECOND CAUSE OF ACTION**

5 **Federal Unfair Competition and False Designation of Origin**

6 **(15 U.S.C. § 1125(a))**

7 **(Against Defendants)**

8 30. Plaintiff realleges and incorporates herein by reference the allegations contained in
9 Paragraphs 1-29, inclusive, of this Complaint, as though set forth in full herein.

10 31. This is a claim for false designation of origin and unfair competition pursuant to
11 15 U.S.C. § 1125(a).

12 32. Plaintiff is informed and believes, and based thereon alleges, that Defendants' use
13 of Plaintiff's trade dress without consent or permission, along with its advertisement and
14 marketing of the Infringing Product with the goal of misleading consumers to believe that the
15 Infringing Product is somehow associated with the proprietary "Acne.org Regimen," together
16 constitute a false designation of origin, false or misleading description of fact and/or false or
17 misleading representation of fact, which are likely to cause confusion, mistake and/or to deceive
18 as to the affiliation, connection and/or association of such person with another person, or as to the
19 origin, sponsorship, or approval of his or her goods, services or commercial activities by another
20 person, in violation of 15 U.S.C. § 1125(a).

21 33. Plaintiff is informed and believes, and based thereon alleges, that Defendants' use
22 of Plaintiff's trade dress without consent or permission, along with its advertisement and
23 marketing of the Infringing Product with the goal of misleading consumers to believe that the
24 Infringing Product is somehow associated with the proprietary "Acne.org Regimen," together
25 constitute a false designation of origin, false or misleading description of fact and/or false or
26 misleading representation of fact, which in commercial advertising or promotion, misrepresents
27 the nature, characteristics, qualities, or geographic origin of his or her or another person's goods,
28 services, or commercial activities in violation of 15 U.S.C. § 1125(a).

1 34. Plaintiff is informed and believes, and based thereon alleges, that Defendants' 2 conduct is likely to confuse, mislead, and deceive both Plaintiff's customers and the general 3 public as to the origin of Plaintiff's and Defendants' trade dress and cause said persons to believe 4 that Defendants and/or its/his/their products have been sponsored, approved, authorized and/or 5 licensed by Plaintiff or are somehow affiliated or connected with Plaintiff.

6 35. Plaintiff is informed and believes, and based thereon alleges, that Defendants' acts 7 were undertaken willfully and with the full knowledge of the falsity of such designation of origin 8 and false descriptions and/or representations, and intended to cause confusion, and to mislead and 9 deceive the purchasing public.

10 36. Plaintiff is informed and believes, and based thereon alleges, that Defendants have 11 actually derived and received, and will continue to derive and receive, significant and substantial 12 gains, profits and advantages from its false designation of origin, false and misleading statements, 13 descriptions of fact, or false or misleading representations of fact in an amount not presently 14 known to Plaintiff, but in excess of \$75,000, and which will be proven at trial. As a direct and 15 proximately result of Defendants' conduct described herein, Plaintiff has been damaged and is 16 entitled to injunctive, equitable and/or monetary relief in an amount to be proven at trial.

17 37. Plaintiff is informed and believes, and based thereon alleges, that as a direct and 18 proximate result of Defendants' conduct, constituting false designation of origin, false or 19 misleading statements, false or misleading descriptions of fact and/or false or misleading 20 representations of fact, Plaintiff has suffered, and will continue to suffer, great and irreparable 21 injury for which Plaintiff has no adequate remedy at law.

22 WHEREFORE, Plaintiff prays for damages as set forth below.

23 **THIRD CAUSE OF ACTION**

24 **California Unfair Competition**

25 **(Cal. Bus. and Prof. Code § 17200)**

26 **(Against Defendants)**

27 38. Plaintiff realleges and incorporates herein by reference the allegations contained in 28 Paragraphs 1-37, inclusive, of this Complaint, as though set forth in full herein.

39. This is a claim for unfair competition, in violation of California Business and Professions Code § 17200, *et seq.*

40. Plaintiff is informed and believes, and based thereon alleges, that Defendants have willfully and intentionally advertised, marketed and sold the Infringing Product through both its website and through Amazon.com to California customers and consumers, and in doing so, has misled said customers and consumers as to the relation of the Infringing Product with the 2.5% BP Product and the “Acne.org Regimen.”

41. California Business & Professions Code § 17200 prohibits any “unlawful, unfair or fraudulent business act or practice.” Defendants’ acts of trade dress infringement and false designation of original complained of herein constitute an unlawful and unfair business practice, and have caused actual harm to Plaintiff.

42. Plaintiff is informed and believes, and based thereon alleges, that as a direct and proximate result of Defendants' unlawful conduct, Defendants have derived and received, and will continue to derive and receive, gains, profits and advantages from Defendants' unfair competition in an amount not presently known to Plaintiff. Further, Plaintiff is informed and believes, and based thereon alleges, that Plaintiff has been directly harmed by Defendants' unfair competition, that Defendants' wrongful and intentional conduct was a direct and substantial factor in causing harm to Plaintiff and that Plaintiff has suffered, and will continue to suffer, great and irreparable injury for which Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for damages as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in its favor against Defendants as follows:

A. For a preliminary and permanent injunction, pursuant to 15 U.S.C. § 1116, enjoining Defendants, its officers, directors, agents, servants, employees, contractors, members, managers and attorneys, including those persons acting in concert and/or participation with Defendants, from engaging in the following activities:

a. Using the 2.5% BP Product trade dress, or another other trade dress that is confusingly similar to the 2.5% BP Product trade dress:

- 1 b. Manufacturing, using, displaying, marketing, advertising, distributing
2 and/or selling any goods which infringe the 2.5% BP Product trade dress;
- 3 c. Displaying, marketing, advertising, distributing and/or selling any goods
4 which mislead consumers to believe that the Infringing Product is
5 somehow associated with the proprietary "Acne.org Regimen";
- 6 d. Falsely designating the origin of the Infringing Product;
- 7 e. Unfairly competing with Plaintiff in any manner whatsoever;
- 8 f. Making any false or misleading statements, descriptions of fact or false or
9 misleading representations of fact; and/or
- 10 g. Causing a likelihood of confusion or injuries to Plaintiff's business
11 reputation.

12 B. For an Order adjudging Defendants to have willfully infringed the trade dress of
13 the 2.5% BP Product, in violation of 15 U.S.C. § 1125.

14 C. For an Order adjudging Defendants to have falsely designated the origin of the
15 Infringing Product, in violation of 15 U.S.C. § 1125.

16 D. For an Order adjudging Defendants to have unfairly competed with Plaintiff under
17 15 U.S.C. § 1125 and California Business & Professions Code § 17200, *et seq.*

18 E. For an Order that Defendants account for all gains, profits and advantages derived
19 by Defendant from the infringement of the 2.5% BP Product, false designation of origin and
20 federal unfair competition, and that Defendants pay to Plaintiff all damages suffered by Plaintiff,
21 and/or Defendants' total profit from such infringement, up to three times the amount of actual
22 damages, pursuant to 15 U.S.C. § 1117.

23 F. For an Order adjudging that this is an exceptional case.

24 G. For an Order that Defendants pay to Plaintiff all costs and attorneys' fees incurred
25 with respect to this action, pursuant to 15 U.S.C. § 1117.

26 H. For an Order that Defendants' acts of trade dress infringement, false designation of
27 origin and unfair competition were willful.

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I. For an Order that Defendants be ordered to destroy any remaining inventory of infringing products, as well as all advertising and promotional materials, displays, stationary, business cards, web pages and/or other materials relating to said infringing products, pursuant to 15 U.S.C. § 1118.

J. For an Order piercing the corporate veil of Defendant Secret by Nature, LLC, such that Defendant Mr. Song can and shall be held personally liable for the tortious conduct of Defendant Secret by Nature, LLC, as alleged herein.

K. For compensatory damages in an amount to be proven at trial.

L. For pre-judgment and post-judgment interest according to proof.

M. For such other and further relief as this Court may deem proper.

Dated: July 7, 2016

BUCHMAN PROVINE BROTHERS SMITH LLP

By: /s/ DOMINIC V. SIGNOROTTI

Dominic V. Signorotti
Attorneys for Plaintiff
MYSFYT, INC., a California corporation

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: July 7, 2016

BUCHMAN PROVINE BROTHERS SMITH LLP

By: /s/ DOMINIC V. SIGNOROTTI

**Dominic V. Signorotti
Attorneys for Plaintiff
MYSFYT, INC., a California corporation**